amendments. AR 2331-62; CA App. 145. It implements the conclusion of the peer review panel by focusing management efforts on increasing lobster egg production. AR 2360.[5]

Amendment 3 imposes categorical restrictions on lobster size and catch of egg-bearing females. The plan sets forth separate provisions addressing fishing with traps (the gear used for the vast majority of landings) and fishing with "non-trap" gear such as nets. It limits the size and number of traps per vessel and requires an increase in the size of the escape vents in traps for young, small lobsters. AR 2363. As to non-trap gear, Amendment 3 adopts a "100/500" provision, limiting the taking of lobster with non-trap gear to 100 a day, up to a maximum of 500 per trip of five days or more. AR 2362. The100/500 rule thus allows non-trap fishermen who catch lobster incidentally as bycatch to retain those lobsters up to the prescribed limits. AR 94. Section 3.5 of Amendment 3 provides that ASMFC States may retain or adopt measures more stringent than those set out in the plan. CA App. 179.[6]

At the time Amendment 3 was adopted, responsibility for adopting fishery management regulations in Rhode Island was lodged in the Rhode Island Marine Fisheries Council (RIMFC), a body composed of eight private citizens (six from the fishing industry) and the Director of the DEM. See R.I. Pub. Laws 1981, ch. 197, § 3; *Healey v. Bendick*, 628 F.Supp.

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[5] At the time Amendment 3 was approved, lobster egg production had diminished to between one and three percent of what it would be in an unfished stock, far below the 10% level that signals overfishing. AR 3191.

[6] Before the adoption of Amendment 3, Maine, the ASMFC member state with by far the largest lobster fishery, prohibited the catching of lobsters by means other than traps. 12 M.R.S.A. § 6952(1). Maine's "pot only" restriction remains in effect, as do those of two other member states. See N.Y. Env. Cons. Law § 13-0329 (also restricting lobster fishing to traps); 19 Mass. Gen. Laws Ann., ch. 130, § 37 (prohibits the landing of lobsters harvested by mobile gear). See also 6 N.H. Code Admin. R. Ann., Fish. 602.08 (pre-Amendment 3 provision imposing 100/500 limit on landings taken by non-trap gear).

681, 685 & n.3 (D.R.I. 1986).

After the Commission adopted Amendment 3, Rhode Island promptly issued a regulation implementing the 100/500 rule restricting non-trap lobster catch for State jurisdictional waters. AR 6329. Facing sharp opposition from some in the State's fishing industry, however, the RIMFC rescinded that regulation in June 2000. AR 6331. The sole public official on the RIMFC (the designee of the Director of the DEM)), declined to support the rescission, and both the Director and the Governor of Rhode Island objected to the RIMFC's action. AR 06331, 6466, 6542.[7]

Because the State was no longer in compliance with an essential element of a Commision plan, the ASFMC referred the matter to the Secretary of Commerce, who made specific determinations of noncompliance and conservation necessity under 16 U.S.C. 5106(a), and published a moratorium notification. 66 Fed. Reg. 13,443 (Mar. 6, 2001). The Secretary observed, however, that Rhode Island had temporarily resumed implementation of the 100/500 rule, and accordingly delayed implementation of the moratorium. *Id.* at 13,444. On March 28, 2001, the State, through the DEM, made the 100/500 rule permanent. See R.I. Code Reg. 12.080.012.15.18 ("Regulation 15.18"). The Secretary thereupon withdrew the moratorium declaration, which never went into effect.

In July 2001, Rhode Island's legislature enacted a statute

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[7] While Director Reitsma questioned the conservation basis for the 100/500 restriction, he preferred to "follow the [ASMFC] amendment process" to address his concerns, AR 6735, and considered the unilateral rescission of the provision, which he declined to sign, as "inconsistent with his responsibilities as Director to administer the provisions of an operational and recognized fishery management plan." AR 6542. Explaining the rescission to the ASMFC Lobster Board, Mr. Gibson of the Rhode Island DEM stated: "I would just add that it was rescinded over the objection of my Division and the Department." *Ibid.* Another Rhode Island representative explained that the concern animating opposition to the 100/500 rule was non-trap fishermen's sense that it discriminated against them, *id.* – a claim petitioner urged below, but has abandoned.

providing that the RIMFC (the body that had rescinded the rule) "shall serve in an advisory capacity only," and expressly divesting it of all regulatory authority over matters of fish, lobster, and shellfish management. R.I. Pub. Laws 2001, ch. 304, § 2, codified at R.I. Gen. Laws § 20-3-2(a). Responsibility for fisheries regulation is now reposed under State law with the Department of Environmental Management. R.I. Gen. Laws § 20-1-2.

In response to the Rhode Island delegation's request that it revisit the 100/500 limitation, the Commission in 2001 approved for public review Amendment 4 to the lobster plan. AR 4201, 7824. This proposal emerged from the formal public procedure available within ASMFC to amend a previously agreed interstate fishery plan, and would have, *inter alia,* authorized States to substitute alternative measures for 100/500 limit if the alternative was found by ASMFC to provide equivalent conservation benefits. AR 7839. Draft Amendment 4 was approved for public review and issued for public comment. AR 7824. After extensive public procedure in which an ASMFC lobster technical committee and a lobster industry advisory group, as well as the vast majority of public commenters, urged that the 100/500 limit not be amended, in August 2002 the ASMFC Lobster Board tabled the proposal indefinitely. AR 6387-7757, 7844-7955.

7. Petitioner catches fish with an otter trawl, a conical net usually used for fishing at or near the ocean floor. He catches lobster as bycatch, incidental to his pursuit of other species.

Petitioner filed suit against the Rhode Island Department of Environmental Management in Rhode Island Superior Court to challenge Regulation 15.18. He alleged that Regulation 15.18 violated State law and the Due Process and Equal Protection clauses of the United States Constitution because it imposed different restrictions on lobster fishing with trap and with non-trap gear. After the State removed the case to federal court, petitioner amended his complaint to add a claim that Rhode Island's adoption of the regulation resulted from impermissible "commandeering" by means of

ACFCMA's moratorium provision, in violation of the Tenth Amendment. Petitioner's amended complaint named the ASMFC as a defendant. The United States intervened under 28 U.S.C. 2403 to defend the constitutionality of ACFCMA.

The district court granted summary judgment for defendants. Rejecting petitioner's claim under the Equal Protection Clause, the court held that the 100/500 limit was rationally related to the legitimate government purpose of rebuilding the depleted lobster stock, and that it functioned as "one component of a comprehensive management scheme which regulates both trap and non-trap lobster fishing as part of the effort to reduce lobster mortality." Pet. App. 28a. The court also rejected petitioner's claim based on the Due Process Clause, concluding that petitioner had failed to "distinguish his due process claim from his equal protection argument" and that his pleadings were "silent as to the basis for his due process claim." Pet. App. 26a. Finally, the district court held that, under *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118 (1939), petitioner lacked standing as a private party not aligned with the State to bring a Tenth Amendment commandeering challenge.

The First Circuit affirmed. It ruled that there was a rational basis for the 100/500 rule for purposes of the Equal Protection Clause, and that, because no fundamental right was at stake, petitioner's substantive due process claim failed on the same ground. Pet. App. at 10a-12a. Like the district court, the court of appeals ruled that petitioner lacked standing to press his Tenth Amendment commandeering claim. The court determined that *Tennessee Electric* was binding on this point, and had not been overruled in *New York v. United States*, 505 U.S. 144 (1992). Pet. App. 13a-15a. The court was "particularly reluctant to second-guess the continuing vitality" of *Tennessee Electric* given what it regarded as difficult questions about "how a private citizen proceeds to establish a Tenth Amendment 'commandeering' claim where the State itself has acquiesced in the federal-state arrangement." Pet. App. 17a.

REASONS FOR DENYING THE PETITION

Petitioner requests that this Court review whether there is a "categorical[] prohibit[ion]" (Pet. i) against private party standing to assert Tenth Amendment "commandeering" claims. But, whether or not there is any such categorical rule, petitioner lacks Article III standing in this case. The Rhode Island fisheries regulation that is the source of petitioner's asserted injury was enacted pursuant to the State's commitments under the ASMFC Compact and under State law, and would remain in place even absent the provisions of federal law that petitioner attacks. Petitioner cannot satisfy the redressability requirement of Article III.[8]

Though the absence of Article III standing is dispositive, the question presented does not warrant this Court's review in any event. Although there is some disagreement among the courts of appeals concerning whether or when private parties may assert "Tenth Amendment" claims, it is neither as broad nor as deep as petitioner suggests, and there is no clear indication that any other court would have decided this case any differently. The ruling below was consistent with this Court's recent reaffirmation in *Kowalski v. Tesmer*, 543 U.S. 125, 128 (2004), that standing to assert the constitutional rights and interests of others is proper only in exceptional circumstances, a reaffirmation that will guide future courts' consideration of the seldom scrutinized question petitioner asks this Court to review.

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[8] Though respondents' brief pointed out the lack of redressability, the court of appeals did not address petitioner's Article III standing to assert his commandeering claim. (The district court ruled that petitioner had alleged injury in fact, but did not address causation or redressability. Pet App. 29a.) In any event, of course, this Court has an independent "'obligation to assure'" itself that Article III requirements are satisfied. *DaimlerChysler Corp.*, 2006 WL 1310731, *6 (citation omitted). See also *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986) ("every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it." (citing, *inter alia*, *Juidice v. Vail*, 430 U.S. 327, 331-32 (1977)).

1. "[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler*, 2006 WL 1310731, *6 (citations and internal quotation marks omitted). Article III requires, as an "irreducible constitutional minimum," that a claimant demonstrate not only an injury in fact, but also that the injury is "'fairly * * * trace[able] to the challenged action of the defendant, and not * * * th[e] result [of] the independent action of some third party not before the court,'" and that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 38, 41-43 (1976)). These latter requirements are often readily satisfied when "the plaintiff is himself an object" of the challenged governmental action. 504 U.S. at 561. "When, however, as in this case,

> a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction-and perhaps on the response of others as well. The existence of one or more of the essential elements of standing 'depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict,' *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.); see also *Simon*, *supra*, 426 U.S., at 41-42[.]

Defenders of Wildlife, 504 U.S. at 562. See also *DaimlerChrysler*, 2006 WL 1310731 at *8 (taxpayers lacked standing to challenge tax exemptions where claimed injury

turned on assumptions about state officials' exercise of "policy judgment" concerning use of tax revenues).

Petitioner cannot carry his "burden of * * * showing that those choices * * * will be made in such manner as to * * * permit redressability of injury." *Defenders of Wildlife*, 422 U.S. at 505. His alleged injury is the restriction on his ability to "catch and sell lobsters in excess of the regulatory limits," Pet. 5, imposed by Rhode Island law. Having now abandoned any contention that Regulation 15.18 violates constitutional limitations applicable to the State, petitioner's sole surviving claim is that he has suffered as a result of what he views as ACFCMA's impermissible commandeering of State fisheries managers who, in turn, have imposed a regulatory burden on him. To show his alleged injury is causally traceable to the constitutional defect claimed – and that the injury would be redressed by a favorable decision on the merits – "it becomes the burden of [petitioner]," to show that it is "likely," were the federal ACFCMA held unconstitutional, that either (1) the Commission itself would remove the 100/500 limitation from its lobster management plan, leading the State to relax its "non-trap" restriction, or (2) Rhode Island would choose to disregard the ASMFC plan and unilaterally rescind Regulation 15.18.

Petitioner has not made – and could not make – any such showing. Since petitioner's current claim is not that *the Commission* or *Rhode Island* have somehow violated the Tenth Amendment, both ASMFC and the State here are "independent actors," who have "unfettered" discretion to exercise their "policy judgment" concerning the management of fisheries in State jurisdictional waters. See *Maine v. Taylor*, 477 U.S. 131, 151 (1986) (noting that a State has "broad regulatory authority to protect * * * the integrity of its natural resources"). See also *DaimlerChysler*, 2006 WL 1310731 at *8 (standing precluded by State officials' "policy judgment" that would leave them free to respond to judicial decision in manner that did not benefit plaintiff) (citation omitted). Petitioner has not identified any constraint in

federal law that prevents the Commission and Rhode Island from managing the lobster harvest in State waters according to their respective compact and State law commitments and their policy judgment, nor anything that would require them to alter the 100/500 rule, regardless of whether the federal moratorium provision were struck down. In fact, owing to Rhode Island's commitment to its sister States, there is every reason to expect the 100/500 limit would remain in place.

Petitioner's effort to depict Regulation 15.18 as a federal mandate overlooks Rhode Island's commitments to the Commission and the other ASMFC States, which are independent of (and predate) ACFCMA. In 1941 the Rhode Island legislature "authorized and directed" the Governor to execute the Atlantic States Marine Fisheries Compact. R.I. Gen. Laws § 20-8-1. Under the Compact, "[t]he contracting states solemnly agree" to the compact purpose, namely, "to promote the better utilization of the fisheries, marine, shell and anadromous, of the Atlantic seaboard by the development of a joint program for the promotion and protection of such fisheries * * * *" *Ibid.* The Rhode Island legislature directed all State officers "to do all things falling within their respective provinces and jurisdiction necessary or incidental to the carrying out of the compact in every particular," and declared it "the policy of the state of Rhode Island to perform and carry out the compact and accomplish its purposes." R.I. Gen. Laws § 20-8-7. Implementing the Compact, the ASMFC member States adopted the Commission's Interstate Fisheries Management Program Charter, which provides in part: "All [member] states are responsible for the full and effective implementation and enforcement of fishery management plans within areas subject to their jurisdiction." ISMFP Charter, Sec. 7(a).

Petitioner has shown no "likelihood" that the Commission will choose to eliminate or relax the 100/500 requirement, which was adopted unanimously after an exhaustive inquiry into the depleted lobster fishery, and reaffirmed after thorough reconsideration in connection with proposed

Amendment 4. *Supra*, pp. 6-8.

Nor has petitioner begun to show it to be likely that, absent the possibility of a federal moratorium, the State would choose to disregard the ASMFC plan's 100/500 requirement by rescinding Regulation 15.18. Rhode Island has been a member of the ASMFC Compact since its inception, and takes seriously its obligations to its other compacting States under the Compact and the ISMFP Charter, as well as its obligation under State law to "carry out the compact and accomplish its purposes." R.I. Gen. L. § 20-8-7.[9]

The Commission lacks coercive power over member States. The member States, however, have committed *inter se* to adhere to the provisions of coastal fishery management plans. They have done so because they perceive a benefit from the "coordinated exercise" of their respective police powers, see Compact, Art. IV, to enhance the health and protect the value of shared coastal fisheries. Because States secure real long-run resource management benefits from the cooperative interstate program the Compact facilitates, their commitment to comply with ASMFC plans extends to instances in which a given State's own representatives on the Commission might have favored a different result. Here, as noted, the compacting States' vote to adopt Amendment 3 was unanimous. AR 1401-1404.

Petitioner's intimation that Rhode Island would, in fact, rescind its 100/500 rule absent ACFCMA's moratorium provision depends upon treating the RIMFC's private citizen appointees – whose role under State law is now purely advisory – as a truer exponent of State policy than the State

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[9] Petitioners obliquely recognize the State's distinct compact obligations, asserting that the state "cannot single-handedly change Commission policy," and may be "hesitant to challenge the Commission" for fear of "reprisals." Pet. 24. But not only is petitioner's intimation of coercion on the part of the Commission entirely unsupported, but he has never asserted any claims attacking Rhode Island's participation in the Commission (claims that would have themselves presented serious private standing problems).

Legislature itself. But see R.I. Const., Art. VI, Sec. 2 (vesting "the legislative power" in the General Assembly). And identifying occasions in which some State officials debated the 100/500 limitation's policy merits is a far cry from demonstrating that the State would choose to disregard its obligations under the ISMFC Charter to fully implement and enforce Amendment 3.[10]

The General Assembly's decision to strip the RIMFC of regulatory authority and give it a role that is "advisory only" – a step that went far beyond anything required to avoid the possibility of a federal moratorium – sets in relief petitioner's inability to show "that relief is likely to follow from a favorable decision here[.]" *ASARCO*, 490 U.S. at 615 (plurality opinion of Kennedy, J.). That 2001 legislation makes all the more implausible any suggestion that striking down the federal moratorium provision would set in motion a State-law process that would ultimately free petitioner from the obligation of Regulation 15.18. Not only does petitioner's argument for redressability ask the federal courts improperly to "assume a particular exercise of the state's [resource management] discretion," *DaimlerChrysler*, 2006 WL 1310731 at *9, but the specific assumptions he asks the courts to make are, in the circumstances here, extremely improbable.

2. Petitioner's discussion of Article III standing (Pet. 25-28) is largely addressed to the abstract question whether, in principle, private commandeering claimants could satisfy the

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[10] Both the Governor of Rhode Island and the Director of the DEM strongly objected to the decision, one supported solely by the private citizen appointees to the RIMFC. AR 6331, 6542. The controversial nature of the RIMFC's action within Rhode Island's government was described by ASMFC Commissioner Gibson of Rhode Island, who explained that, despite that opposition, "our Council moved ahead, anyway. Evidently, there is a procedural way in which a majority of the Marine Fisheries Council who had supported the action [*i.e.*, the rescission of the 100/500 rule] can in fact file a regulation with the Secretary of State without the Department's support. That, in fact, was done, and it just appeared June 29th." AR 6542.

constitutional test for standing. But the immediate question is not whether a private commandeering claimant will ever be able to satisfy the tripartite Article III test, but whether petitioner has done so in this case. He has not.

Petitioner asserts (Pet. 27) that redressability "poses no barrier" in privately prosecuted commandeering suits because "the individual would not be required to comply with the state regulation adopted pursuant to the unconstitutional federal mandate." Here, however, as we have shown, Regulation 15.18 is independently grounded in Rhode Island's commitments under the ASMFC Compact and State law, and redress for petitioner depends upon implausible assumptions about how the Commission and the State would exercise their unfettered discretion. Similarly, petitioner asserts that "invalidation of federal law would preclude enforcement of that law by state executive officials," Pet. 27, a point that has no relevance to this case, which does not involve State enforcement of any federal law. Petitioner's discussion again ignores the interstate compact context in which Rhode Island fisheries management operates.

Petitioner also argues that the Article III standing question "could be addressed" on remand after the Court rules on the question presented in the petition. Pet. 26. This Court's decision in *Kowalski*, 543 U.S. at 128, indicates that the Court may, consistent with *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), assume that Article III standing is proper and proceed to order dismissal for lack of third-party standing (among other "threshold" grounds, see *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999)). But the propriety of *dismissal* on an alternative threshold ground does not legitimize ruling on and then remanding a case in which Article III standing is lacking – a course of action that bears hallmarks of an advisory opinion. None of this Court's decisions holds that the Court may assume Article III standing when the record and governing law affirmatively proclaim it to be lacking.

Nor is petitioner correct (Br. 27-28 n.11) to suggest that

recognizing the lack of Article III standing in his case would deprive any party of standing in commandeering cases. When a federal statute directly imposes obligations upon the plaintiff – a condition that will by definition be satisfied in most commandeering cases at least as to State plaintiffs – causation and redressability will be more readily established, see *Defenders of Wildlife*, 504 U.S. at 561, because the challenged federal statute will be the very cause of plaintiff's injury-in-fact, and a decree invalidating the statute will remedy the burden. That was the case in *New York v. United States*, which resulted in a decree freeing the plaintiff State from the burden of a federal obligation to "take title" to radioactive waste, 505 U.S. at 176-77,[11] and in *Printz v. United States*, 521 U.S. 898, 933 (1997), which freed the

[11] Petitioner errs in arguing (Pet. 20-21) that *New York* supports private standing to assert a commandeering claim. In that case, the State was pressing its own objection to a federal statutory imposition, and the Court's opinion does not address private standing. *New York*'s explanation that the ultimate aim of Tenth Amendment federalism limits – like the ultimate aim of many legal provisions – is the "protection of individuals," 505 U.S. at 182, does not make the Amendment's prohibition against commandeering enforceable (over the opposition of the relevant State) at the behest of private citizens or -taxpayers. Protection of individuals is no less the ultimate object of the constitutional provisions at issue in *Ex Parte Levitt*, 302 U.S. 633 (1937) (prohibition on appointment of members of Congress, during their elected term, to federal office for which pay was increased during term, Art. I, § 6, cl. 2), and *United States v. Richardson*, 418 U.S. 166, 168 (1974) (Accounts Clause, Art. I, § 9, cl. 7). *New York*'s confirmation that State officials' ability to assert a commandeering claim is not foreclosed by the acquiescence of their predecessors, see 505 U.S. at 181-83, *enhances* States' ability to protect their distinctive interests as sovereigns, cf. *Beers v. Arkansas*, 61 U.S. 527, 530 (1858) (state legislature may withdraw waiver of Eleventh Amendment immunity), whereas petitioner's rule would weaken that ability. Indeed, *New York* itself illustrates that petitioner's expansive rule of private standing is unnecessary – the people of the State through their elected officials took issue with, and overturned, the federal imposition. And while *New York* rejected a broad rule of waiver, it expressly reserved judgment whether estoppel might be appropriate in cases involving interstate compacts. See 505 U.S. at 183.

plaintiff sheriff from federal record-keeping obligations imposed on him under a federal gun control statute. Here, however, the plaintiff is regulated only by State law, and there are compelling reasons to believe that State law would remain in place, regardless of the fate of plaintiff's federal commandeering claim, owing to the independent policy discretion of nonfederal governmental actors.

FEC v. Akins, 524 U.S. 11 (1998) (cited in Pet. 27), in no way supports petitioner's standing here, either. *Akins*' standing analysis relied on the familiar principle of federal administrative law that a party may challenge an agency decision reached on allegedly unlawful grounds, even though the agency might on remand reach the same result through a proper route. *Id.* at 24 (citing *SEC v. Chenery Corp.*, 318 U.S. 80 (1943)). Nothing in *Akins* purported to relax the settled rule that when the redress for the plaintiff depends upon the choices of independent actors, the plaintiff must demonstrate a likelihood that those others would act in such a way as to redress the injury – a showing that is extremely difficult to make when, as here, those other actors enjoy unfettered policy discretion. See *DaimlerChysler*, 2006 WL 1310731 at *8-*9.

3. Even if within this Court's Article III power to resolve, the private party standing issue would not warrant this Court's review. While several lower courts have voiced differing views on whether or when a private party may bring a "Tenth Amendment" claim, any division is not deep or clearly defined. The few cases in which standing has been recognized are distinguishable from the instant case, and there are good reasons to allow the lower courts to consider the matter further before this Court takes up the issue.

In addition to the First Circuit in the decision below, the Tenth Circuit has concluded, based in part on *Tennessee Electric*, that private parties lack standing to raise Tenth Amendment claims. See *United States v. Parker*, 362 F.3d 1279, 1284-85 (10th Cir.), *cert. denied*, 125 S. Ct. 88 (2004); see also *Mountain States Legal Foundation v. Costle*, 630

F.2d 754, 761 (10th Cir. 1980) ("Only the State has standing to press claims aimed at protecting its sovereign powers under the Tenth Amendment.") (citing this Court's discussion of third party standing in *Duke Power Co. v. Carolina Env'l Study Group, Inc.*, 438 U.S. 59, 80 (1978)). Other courts of appeals have also suggested in dicta that private standing is lacking. See *United States v. Brockway*, 769 F.2d 263, 265 (5th Cir. 1985) (calling it a "doubtful assertion" that defendant "possesses standing to assert the state's tenth amendment complaint"); see also *Gaubert v. Denton*, 1999 WL 350103 *5 (E.D. La. 1999) (denying standing based upon *Tennessee Elec.*), *aff'd without op.*, 210 F.3d 368 (5th Cir. 2000); *Nance v. EPA*, 645 F.2d 701, 716 (9th Cir. 1981) ("insofar as the tenth amendment is designed to protect the interest of states qua states," private standing "may be seriously questioned").

On the other side of the putative split, the Eleventh Circuit has thrice held that private parties do have standing to assert Tenth Amendment claims. However, two of those cases involved no "commandeering" claim, instead addressing claims by directly regulated private parties that the federal government had exceeded the substantive limitations imposed by the Tenth Amendment. See *Atlanta Gas Light Co. v. United States Dep't of Energy*, 666 F.2d 1359, 1368 (11th Cir.) (challenged "regulations * * * are directed not to the 'States as States,' but rather to the wholly private natural gas distribution industry"), *cert. denied*, 459 U.S. 836 (1982); *Seniors Civil Liberties Association v. Kemp*, 965 F.2d 1030, 1034 n.6 (11th Cir. 1992) (rejecting Tenth Amendment challenge to "federal 'regulation of *private* activities affecting interstate commerce'") (quoting *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S 264, 292 (1981); emphasis added by 11th Circuit).

The distinction is pivotal both because (as explained above) direct regulation does not raise issues of causation and redressability that "commandeering" objections present, and because such claims are inherently different from "commandeering" claims. A commandeering claim rests not

upon the principle that Congress categorically lacks power over the subject matter in question, but instead that, by requiring States to enforce federal law, Congress has exercised power in a manner that infringes their structural autonomy. See *New York*, 505 U.S. at 155-60. See also *id.* at 159 ("Petitioners do not contend that Congress lacks the power to regulate the disposal of low level radioactive waste.") Commandeering claims are uniquely about the machinery of State government, and necessarily turn on a probing analysis of the often complex relationships between State and federal institutions. See Pet. App. 17a. Unlike the enumerated powers variety of "Tenth Amendment" claim, commandeering claims necessarily involve a State whose sovereignty is alleged to have been affronted; that private parties may challenge on enumerated powers grounds federal laws directly regulating them does not establish that they may sue to vindicate a State's right to be free of federal commandeering.[12]

Moreover, in each of the three 11th Circuit cases embracing the private standing rule, the court expressed significant doubts about its soundness. *Atlanta Gas Light Co.*, 666 F.2d at 1368 n.16 ("express[ing]" court's "uncertainty" about decision to recognize private party standing); *Seniors Civil Liberties Association*, 965 F.2d at 1034 n.6 (recognizing private standing, despite "admitted doubts," because court had done so in *Atlanta Gas*); *Dillard*, 225 F.3d at 1277 (recognizing private standing, but adding that "even if a

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[12] The other Eleventh Circuit case was not a proper commandeering case either. In *Dillard v. Baldwin County Com'rs*, 225 F.3d 1271, 1281 (11th Cir. 2000), private intervenors sought to challenge, on "Tenth Amendment" and other grounds, "the allegedly unconstitutional decision by a federal district court to alter the size of a local governing body." The court rested its decision to recognize "Tenth Amendment" standing on the two earlier circuit decisions, but also found that the private intervenors would have standing under the Voting Rights Act to object to the injunction. *Id.* at 1276-77. See also *Dillard v. Baldwin County Com'rs*, 376 F.3d 1260 (11th Cir. 2004).

private plaintiff's standing to assert a Tenth Amendment claim were contingent upon its having standing to assert some other constitutional or statutory claim," test was satisfied because plaintiffs had standing to assert claim "under Section 2 of the Voting Rights Act"); *id.* at 1283 (Barkett, J., concurring) (expressing "reservations" about whether *Atlanta Gas* and *Seniors Civil Liberties Ass'n* were correctly decided). In none of those cases has that court of appeals itself actually addressed the effect of *Tennessee Electric* – the only mention is in a concurrence in the most recent of the cases in which one judge expressed concern about the inconsistency of the circuit's rule with that decision. *Id.*

Guillen v. Pierce County, 144 Wash.2d 696, 730-731, 31 P.3d 628, 648 (Wash. 2001), *rev'd in part*, 537 U.S. 129 (2003), likewise involved a claim that a federal statute exceeded the scope of the powers delegated to Congress under Article I of the Constitution.[13] As the United States noted in *Pierce County*, U.S. Br. at 24-25 (No. 01-1229), private plaintiffs who can satisfy Article III requirements have standing to assert "enumerated powers" challenges to federal statutes and regulations directly affecting them, whether or not those challenges are cast in "Tenth Amendment" terms. In contrast, a rule allowing private parties to set themselves up as "private attorneys general" for nonconsenting States would itself offend principles of State autonomy, dignity, and independence – in ways that allowing private parties directly affected by federal statutes to enforce the categorical limitations of Art. I, Sec. 8, does not.

Petitioner highlights the Seventh Circuit's decision in

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[13] Petitioner overstates the significance of the Court's grant of certiorari on the standing issue in *Pierce County*. In that case, the Supreme Court of Washington had struck down a federal statute, creating a prototypical need for this Court's review. See 537 U.S. at 140 ("We granted certiorari to resolve the question of the constitutionality of this federal statute."). The Court's decision to grant certiorari on the separate standing question may be less significant than had the Court granted it as a free-standing issue.

Gillespie v. City of Indianapolis, 185 F.3d 693 (7th Cir. 1999), *cert. denied*, 528 U.S. 1116 (2000), which did embrace private party standing, concluding that this Court's discussion in *Tennessee Electric* was mere dictum. 185 F.3d at 700-703. But *Gillespie*, unlike this case, involved a federal statute that, by prohibiting individuals with domestic violence convictions from possessing firearms, directly regulated the plaintiff. And although plaintiff in *Gillespie* characterized his claim as involving alleged commandeering, his contention that Congress lacked power to ban him from possessing a firearm more closely resembled a conventional "enumerated powers" challenge, see *id.* at 705-706. (Indeed the Seventh Circuit disposed of the claim on the ground that a law of general applicability does not raise "Tenth Amendment" concerns merely because it incidentally burdens a State officer.) It remains to be seen whether the Seventh Circuit would approve private standing to attack a statute that did not directly regulate the plaintiff. Furthermore, the *Gillespie* opinion strongly suggests that the Seventh Circuit would recognize the lack of *Article III* standing in a case like this one. *Id.* at 703 (plaintiff's injury "the loss of the ability to carry a firearm, and the consequent loss of his job as a police officer * * * * can also fairly be traced to the constitutional violation that he attributes to Congress in enacting the amendments to the statute, for if we declared the statute unconstitutional, the firearms disability would be nullified and Gillespie would regain his right to carry a firearm.").[14]

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[14] Petitioner also seeks to invoke various decisions in which courts of appeals "reached the merits of private parties' Tenth Amendment claims" without discussing standing, see Pet. 15 & nn.7,8 – suggesting that because these cases were decided after *Steel Company*, they can be tallied as having *sub silentio* approved private party Tenth Amendment standing. *Steel Company*, however, expressly approves the practice of assuming *prudential* standing, as distinct from Article III standing, in order to resolve a case on the merits. See 523 U.S. at 97 (citing *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453, 465 n.13 (1974)). All of the decisions cited in petitioner's footnotes 7 and

And in no case petitioner cites or of which we are aware of has a court found standing – let alone private party standing – to raise a "commandeering" objection to a statute or law adopted to fulfill obligations under an interstate compact. See *New York*, 505 U.S. at 183 (reserving judgment whether *State* might be estopped from raising 10th Amendment claim after entering into compacts) (citing *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 35-36 (1951) (Jackson, J., concurring)).

Simply put, there is no genuine conflict of authority as to whether the question on which this Court's review is sought, namely, whether a "commandeering" claim may be privately pursued. The relatively few decisions on private "Tenth Amendment" standing have arisen in widely disparate contexts, differing in ways highly relevant to the propriety of allowing private standing. If a clear and consistent disagreement should arise – if petitioner is right that the cases "arise frequently," Pet. 18 – the Court will have ample time to address it, presumably in a case lacking the distinct complications peculiar to the interstate compact setting and lacking the fatal Article III problems presented here.

4. *Tennessee Electric*'s rule against private party standing, 306 U.S. at 144, although enunciated tersely and prior to the elaboration of the modern law of Article III standing, is supported by this Court's more recent jurisprudence concerning the proper role of federal courts. Although petitioner labors to demonstrate that private parties are within the "zone of interests" protected by the Tenth Amendment anti-commandeering principle, that is not the only or even the primary prudential standing principle vindicated by the *Tennessee Electric* rule.

As this Court has recently reaffirmed, federal courts have long disfavored claims premised "on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499

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8 in which petitioner suggests standing was implicitly recognized went on to reject the "Tenth Amendment" claim (many of them not commandeering claims) on the merits.

(1974). The basic reasons for this rule – "the avoidance of the adjudication of rights which those not before the Court may not wish to assert, and the assurance that the most effective advocate of the rights at issue is present to champion them," *Duke*, 438 U.S. at 80 (citation omitted) – apply with far greater force when a State resident seeks to enlist a federal court to relieve him of obligations imposed by a State whose "sovereignty" he purports to vindicate. See *Mountain States Legal Foundation*, 630 F.2d at 761.

These concerns have special force when the party whose rights and interests being asserted by another is a sovereign State. States have a strong interest in ensuring that, when commandeering claims are asserted, they are brought by parties with the incentive, resources, and ability to press such claims effectively. Allowing private parties to bring these claims, which by definition directly implicate the State's sovereign interests, strips States of the ability to decide when and in what circumstances to initiate these highly consequential suits on federal-state relations, and diverts State resources (whether the State is a defendant or intervenes to protect its interests). It bears noting, in this regard, that in not one of the petitioner's privately prosecuted commandeering cases did the plaintiff actually prevail on the merits. There is no indication that States are withholding meritorious claims – and not basis to accept petitioner's suggestion that States be treated as presumptively "corrupt[ed]" (Pet. 23) – and a rule that invites unmeritorious private suits, often against the States, would ill serve federalism.

And while an unsuccessful privately prosecuted commandeering claim should not have preclusive effect in a subsequent commandeering action brought by the State – at least if the affected State managed to remain a stranger to the private suit – such decisions would have *stare decisis* effect, impairing the State's ability to assert such claims in the forum, at the time, and on the record of its choosing. Adhering to a prudential rule reserving to States and their officers standing to press such claims serves to protect the

resources and discretion of the entities at the core of the Tenth Amendment's concern, and is more consistent with preserving robust constitutional protection for State sovereignty.[15]

Indeed, this case does not even satisfy the limitations imposed in run of the mine third party standing cases. As explained in *Kowalski*, while the rule against third party standing is not "absolute," the Court has

> limited this exception by requiring that a party seeking third-party standing make two additional showings. First, we have asked whether the party asserting the right has a 'close' relationship with the person who possesses the right. *Powers v. Ohio*, 499 U.S. 400, 411 (1991). Second, we have considered whether there is a 'hindrance' to the possessor's ability to protect his own interests. *Ibid.*

543 U.S. at 130. Outside these narrow exceptions, the Court has "not looked favorably upon" third-party standing. *Ibid.*

These standards are not satisfied in commandeering cases like this one. Petitioner, as a private citizen, cannot claim a "close" relationship with the State of Rhode Island. Cf. *Kowalski*, 543 U.S. at 130-32. Nor is there any apparent "hindrance" preventing a State or its subdivision that believes it has been unconstitutionally commandeered from itself repairing to court. See Pet. 18 (citing commandeering cases

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[15] *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (cited in Pet. 28), does not help petitioner. Plaintiff there sued to vindicate an individual right under the Equal Protection Clause to compete on an equal basis with other applicants free of purposeful racial discrimination. See *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville, Fla.*, 508 U.S. 656, 667 (1993). But there is no individual right to be free of State laws that are the alleged product of federal commandeering. See *Whitmore v. Arkansas*, 495 U.S. 149, 160 (1990) (confirming that "'generalized interest of all citizens in constitutional governance,'" or "'an asserted right to have the Government act in accordance with law,'" do not suffice for standing) (quoting, respectively, *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 217 (1974), and *Allen v. Wright*, 468 U.S. 737, 754 (1984)).

brought by State entities). State and local governmental bodies typically have the resources and legal staff to present such challenges vigorously and effectively, cf. *Kowalski*, 543 U.S. at 142-43 (arguing that indigent criminal defendants denied counsel on appeal faced "hindrance" warranting third-party standing for prospective appellate counsel) (Ginsburg, J., dissenting).[16] States' ability to assert such claims is protected by *New York*'s rule that commandeering claims are not forfeited by State officials' prior acquiescence – a rule that preserves the State electorate's continuing role in protecting the State's sovereign prerogatives.

However much the anti-commandeering principle may ultimately benefit all persons, see *supra*, n. 11, the State's "rights" and "interests" – its meaningful control over the machinery of its government – are the unique and defining gist of a commandeering claim.[17] For that reason, recognizing private party standing would impair, rather than advance, the principles of federalism that the Tenth Amendment embodies. As explained above, private standing would diminish States' control over (and potentially even their ability to prevail upon) the vindication of sovereign

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[16] Neither does this case involve a situation in which "'enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties' rights.'" *Kowalski*, 543 U.S. at 568 (quoting *Warth*, 422 U.S. at 510 (citing, inter alia, *Doe v. Bolton*, 410 U.S. 179 (1973), and *Griswold v. Connecticut*, 381 U.S. 479 (1965)), and citing *Craig v. Boren*, 429 U.S. 190 (1976) (emphasis added in *Kowalski*)).

[17] Petitioner's analogy to separation-of-powers cases (Pet. 22-23) is inapt. Standing for private parties directly affected by a federal law asserted to violate the separation of powers may be necessary to enforce the proper allocation of authority among components of a unitary government (represented in court by one of the competing branches). See *Raines v. Byrd*, 521 U.S. 811, 829-830 & n.2 (1997); *Bender*, 475 U.S., at 544 ("Generally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take"); *United States v. Ballin*, 144 U.S. 1, 7 (1892). By contrast, States are *separate sovereigns*, with the incentive and ability to bring litigation to protect their constitutional prerogatives.

rights that go to the heart of their institutional vitality. Moreover, as in this case, private parties' claims that their government has been "commandeered" will often raise difficult questions of Article III redressability: unlike cases where a governmental plaintiff official maintains it would not enforce a law absent federal pressure, in private party-initiated cases, federal courts would be required to determine the "likelihood" the State would enforce its law in the absence of federal "compulsion" – and theoretically could be asked to overrule representations of State authorities on that question (or resolve disputes between branches of State governments). Under petitioner's rule, private parties would enlist federal courts – in the name of the Tenth Amendment! – to enjoin States from enforcing State laws that violate no constitutional limitation applicable to the State's government. Such an inquiry itself would amount to an extraordinary intrusion on State prerogatives.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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May 30, 2006

Supreme Court, U.S.
FILED
JUN 6 - 2006
OFFICE OF THE CLERK

No. 05-1243

IN THE

Supreme Court of the United States

Stephen P. Medeiros,

Petitioner,

v.

W. Michael Sullivan, Director of the Rhode Island Department of Environmental Management, Atlantic States Marine Fisheries Commission, and United States of America.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY BRIEF FOR THE PETITIONER

Respondents' arguments against certiorari rest on the premise that petitioner's only interest in his Tenth Amendment claim is in securing the repeal of the state Regulation prohibiting him from catching more than one hundred lobsters per day. They contend that three conclusions follow from that premise: (i) that petitioner has no redressable injury for Article III purposes (because the State may simply leave the Regulation in place even if petitioner wins this suit); (ii) that the circuit conflict presented by the petition is narrow (because few cases in other circuits address federal statutes that operate upon states rather than individuals); and (iii) that the holding below is correct on the merits (because only the State, not petitioner, has a direct interest in the outcome).

But this case is not about the 101st lobster. To be sure, petitioner is injured by the limits on his catch; criminal charges were even brought against him for violating the Regulation. But the Tenth Amendment, and petitioner's claim, are about much more than that. By unconstitutionally rendering futile petitioner's attempts to get Rhode Island to rescind the Regulation, the federal scheme that compelled Rhode Island to implement Regulation 15.18 interferes with petitioner's interest in responsive and accountable governance. See Pet. 28. Petitioner thus attempts to vindicate the promise of the Tenth Amendment – *viz.*, that when a regulatory matter is reserved to the states, impermissible federal coercion cannot interfere with the states' ability to regulate in accordance with the views of the local electorate.

Once the false premise of respondents' argument is exposed, the bases for their opposition to the petition fall as well. Petitioner has Article III standing wholly independent of the prospect of the repeal of Regulation 15.18 because the Tenth Amendment safeguards petitioner's right to participate in a state political process unimpeded by unconstitutional federal interference. Invalidation of the federal mandate would immediately redress this constitutional injury. With respect

to the circuit split, this case is indistinguishable from decisions of other courts of appeals recognizing Tenth Amendment standing. And with respect to the merits, there is no basis in law or logic for holding that petitioner lacks standing to vindicate an individual right merely because it resides in the Tenth Amendment. Certiorari should be granted.

I. Respondents' Invocation of Article III Standing Principles Lacks Merit.

Respondents contend that petitioner's suit would inevitably be dismissed on Article III standing grounds even if he had the right as a private party to assert his Tenth Amendment claim. In particular, they maintain that petitioner suffers no redressable injury because, even if the federal statute is invalidated, it is unlikely that Rhode Island would permit him to catch more than one hundred lobsters per day.

a. There are two preliminary answers to respondents' invocation of Article III. Most obviously, that question is not before this Court. The question presented, and the only issue decided by the court of appeals, is whether there is a categorical standing bar wholly separate from Article III against a private party raising a claim under the Tenth Amendment. The question presented is not whether petitioner is the correct private party to do so or whether a private party has standing to challenge this particular regulation.

The Sullivan respondents – but notably not the Solicitor General – assert that because a court has no power to consider the *merits* of a suit without first determining that Article III is satisfied, this Court *must* decide the Article III issue. Sullivan BIO 17 (citing *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998)). This case does not implicate that rule; the only question before this Court is the threshold issue of standing under the Tenth Amendment.

A court may address such alternative standing issues without first finding Article III standing. Such a determination does not implicate the court's power to adjudicate a dispute, and the court always has jurisdiction to determine its

own jurisdiction. See *Kowalski* v. *Tesmer*, 543 U.S. 125, 128-29 (2004) (avowedly addressing third-party standing without first determining whether Article III standing requirements had been satisfied). If this Court reverses the court of appeals' erroneous Tenth Amendment standing holding, it will presumably remand the case for application of the traditional Article III considerations.

The second preliminary answer to respondents' argument is that it is in any event not a basis for denying certiorari. As discussed *infra*, respondents acknowledge that both the Seventh and Eleventh Circuits have explicitly held – in conflict with the First and Tenth Circuits – that private parties have standing to raise the sub-category of Tenth Amendment claims that involves "commandeering." Even if this Court were to go beyond the question presented and hold that private parties lack Article III standing to raise commandeering claims, the Court would still as a practical matter end the national disuniformity that now exists with respect to private parties' ability to bring such claims.

b. Separately, there is no merit to respondents' Article III standing argument. Respondents assert that, if petitioner prevailed, Rhode Island would not permit him to catch more than one hundred lobsters a day. But that is not the only cognizable injury for which petitioner seeks redress. The Tenth Amendment also protects petitioner's concrete interest in participating in the political process to secure the repeal of Regulation 15.18. See *supra* at 1; Pet. 28.

Petitioner has been in the past and will remain an activist on that question. The United States recognizes (at 4) that opposition to the 100/500 rule in Rhode Island has been led by "private citizens (primarily representing fishing interests)." Petitioner is a leader in that effort as an active member of the Rhode Island Inshore Fishermen's Association, a group of otter trawlers that has been very active in efforts to change the 100/500 Rule. If petitioner prevails on his claim, he will regain the opportunity to work to persuade the State to lift the

100/500 rule in a political environment in which all change is not effectively precluded by a federal mandate.

This Court's precedents establish that petitioner has standing. As a leading treatise recognizes, this Court has repeatedly found standing in analogous circumstances based not on "deprivation with respect to already identified property, but [on] deprivation *of the opportunity to persuade others*." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 430 (3d ed. 2000) (emphasis in original). See also Pet. 28; *Northeastern Fla. Chapter of Associated Gen. Contractors* v. *City of Jacksonville*, 508 U.S. 656, 664-66 (1993) (collecting authorities and holding that plaintiff need only allege a deprivation "resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit"); *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978) (holding that plaintiff had standing on the basis of his inability to compete on equal terms notwithstanding his inability to prove that he would achieve admission to medical school).

Respondents' arguments only reinforce this basis for petitioner's standing. The United States argues: "If petitioner believes that state officials are eschewing their responsibilities and should not enforce the 100/500 rule, *his recourse lies in the State's internal mechanisms of accountability*." U.S. BIO 16 (emphasis added). That is petitioner's point: the federal mandate distorts the State's political process and thereby undermines political accountability. See *New York* v. *United States*, 505 U.S. 144, 169 (1992) ("Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not preempted by federal regulation.").

The Sullivan respondents assert (at 13) that "both ASMFC and the State here are independent actors, who have unfettered discretion to exercise their policy judgment concerning the management of fisheries in State jurisdictional waters" (quotation marks omitted). That false claim simply highlights petitioner's constitutionally protected interest in

seeking to effect a change in the Regulation. Under the federal scheme at issue here, the State is *not* genuinely free to adopt its own policies when the necessary consequence would be the destruction of the state's lobster industry.

c. In any event, even if the only question is whether, absent federal coercion, the State would lift the 100/500 rule, it is still fair to conclude that petitioner has Article III standing. Respondents note that Rhode Island initially supported Amendment 3 to the Lobster Management Plan and that Amendment 4, which would have allowed states to substitute measures having equivalent conservation benefits for the 100/500 rule, was subsequently tabled. U.S. BIO 4; Sullivan BIO 6, 9. But although Rhode Island initially supported Amendment 3, the more relevant point is that it later refused to follow it. The State reversed itself once again only when the federal government announced that it would impose a moratorium on lobster harvesting. Moreover, respondents fail to acknowledge that Rhode Island not only proposed Amendment 4 but also voted for the Amendment and opposed its tabling. See Proceedings of ASMFC American Lobster Management Board (Jan. 12-13, 1999); Proceedings of ASMFC Lobster Management Board (Oct. 16, 2001). The record – as opposed to respondents' mere litigating position – strongly supports the conclusion that the State opposes the 100/500 rule and would change it if given the opportunity.

The assertion of the United States (at 10) that "[t]he State has repeatedly explained" that it would not repeal the 100/500 rule – citing only multiple page references in the Sullivan respondents' court of appeals brief – is a dramatic overstatement. The Sullivan respondents do not purport to speak for the Governor or the legislature; rather they are advancing the litigating position of a single state official. Moreover, their argument (at 11) is merely that the State is *compelled* as a matter of state law to adopt and follow Regulation 15.18 wholly independent of the federal mandate petitioner challenges. But that is obviously wrong: the Sullivan respondents elsewhere admit (at 8) that "the RIMFC rescinded [the]

regulation [implementing Amendment 3] in June 2000," with the consequence that "the State was no longer in compliance with an essential element of a Commission plan." Indeed, the federal mandate that petitioner challenges in this case was adopted precisely because states were not complying with the prior voluntary scheme. See U.S. BIO 2 and Sullivan BIO 4 (both acknowledging that "inconsistent implementation" of the Compact led Congress to adopt the current scheme).[1]

Respondents' standing arguments are thus not before the Court, not a basis for denying certiorari, and meritless.

II. Certiorari Should Be Granted to Resolve the Acknowledged Conflict in the Circuits.

The Sullivan respondents frankly acknowledged in their brief below that "federal circuits are split on the issue" of private-party "standing to bring a Tenth Amendment challenge unless aligned with the state." C.A. Br. 29. In this Court, they make another series of telling admissions. They ac-

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[1] Respondents' representation (U.S. BIO 4; Sullivan BIO 8) that the designee of the Director of the DEM and the Governor opposed the refusal to comply with Amendment 3 is quite misleading: they opposed it not on the merits but because they knew, given the federal mandate that petitioner challenges here, that it would lead to a devastating moratorium and would undermine any attempt to repeal Amendment 3. As the Director of the DEM wrote to the relevant federal officials: "We *remain convinced*, however, that the regulation is inappropriate for application in Rhode Island Waters." Pet. App. 59a (emphasis added). See also, *e.g.*, Pet. App. 59a; Declaration of a Moratorium, 66 Fed. Reg. 13,443 (Mar. 6, 2001) (DEM capitulated because otherwise "the welfare of a significant portion of the state's commercial fishing industry and their families * * * would be jeopardized"); Comments of DEM Chairman Malcolm Grant at Nov. 28, 2000 RIMFC Meeting ("modifications to the non-trap provision are being pursued through Amendment 4 and the probability of succeeding would be enhanced through compliance" and that "the largest and most valuable fishery in Rhode Island employing thousands of individuals, is at risk of closure").

knowledge (at 23) that the Seventh Circuit in *Gillespie* v. *City of Indianapolis*, 185 F.3d 693, 703 (CA7 1999), "did embrace private party standing," in response to a claim of Tenth Amendment "commandeering," and specifically concluded "that this Court's discussion in *Tennessee Electric* was mere dictum." They also admit (at 20) that "the Eleventh Circuit has thrice held that private parties do have standing to assert Tenth Amendment claims," including with respect to a "commandeering" claim.

Respondents principally contend that this case implicates a conflict only with respect to these commandeering cases. U.S. BIO 17-18; Sullivan BIO 20. Even if that were so, the split would be clear. The fact that two circuits have reached the opposite result on this important question is a strong basis for certiorari. And that fact moreover establishes that neither circuit would be free in a later case to adopt respondents' view that private-party standing is precluded in commandeering cases. This Court's review is accordingly warranted.

In any event, respondents' distinction between Tenth Amendment commandeering cases and "enumerated powers" cases is illusory. Legally, *none* of the cases addressing the question presented (including the decision below) has ever found the difference relevant. The courts' rules are instead categorical – plaintiffs either may or may not raise claims under the Tenth Amendment. The assertion of the United States (at 17) that "those circuits upheld private parties' standing to bring *some* Tenth Amendment challenges" (emphasis added) is thus pure invention. This Court's precedents, in turn, reject any such distinction. In *New York* v. *United States*, 505 U.S. 144 (1992), the Court explained that commandeering and enumerated powers cases "are mirror images of each other." *Id.* at 156. Contra Sullivan BIO 21 (maintaining that *New York* supports the distinction). For its part, the United States moreover relies principally on *TVA*, which it admits "did not involve a commandeering challenge." U.S. BIO 9 n.2.

Factually, this case illustrates why it is a mistake to conclude that "commandeering" cases only involve a burden on state officials. The federal mandate not only commandeers the Rhode Island legislature, but it also upsets the federal-state balance and diminishes political accountability by interfering with petitioner's ability to seek redress from Regulation 15.18 in the legislature. See *New York*, 505 U.S. at 169. In other words, the federal scheme injures both petitioner's ability, protected by the Tenth Amendment, to participate in the state political process and his economic well-being.

Respondents' remaining attempts to distinguish the conflicting case law are weak. The Sullivan respondents maintain (at 23) that *Gillespie* "more closely resembled a conventional 'enumerated powers' challenge" because the statute "directly regulated the plaintiff," who was precluded under federal law from carrying a firearm. But the plaintiff in *Gillespie* raised – and the Seventh Circuit held that he had standing to maintain – two distinct Tenth Amendment claims: (1) an argument that the Gun Control Act's federal firearms ban exceeded Congress's authority under the Commerce Clause (185 F.3d at 704); and (2) an explicit commandeering claim arguing that the federal ban effectively commandeered state and local governments by precluding them from hiring people in his position (*id.* at 707-08).

Respondents separately rely (see U.S. BIO 21; Sullivan BIO 21) on the fact that some members of the Eleventh Circuit have briefly noted "doubts" about the correctness of that court's precedent. More relevant, however, is that the Eleventh Circuit has applied its rule on three separate occasions, never wavering. It is by this point perfectly clear that the court of appeals will not reverse itself en banc. Any doubts, moreover, are rooted in a single sentence of this Court's decision in *Tennessee Electric Power Co.* v. *Tennessee Valley Authority (TVA)*, 306 U.S. 118 (1939), that only this Court can resolve. See *Dillard* v. *Baldwin County Comm'rs*, 225 F.3d 1271, 1283 n.1 (CA11 2000) (Barkett, J., concurring specially) (expressing concern on the basis of *TVA*).